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Nos. 93-517, 93-527, 93-539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE
KIRYAS JOEL VILLAGE SCHOOL DISTRICT, et al.,

Petitioners,

—v.—

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"), AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

DENNIS RAPPS
COLPA
135 W. 50 Street
New York, NY 10020

(*Of Counsel*)

JULIUS BERMAN
Counsel of Record
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, NY 10022
(212) 836-8000

NATHAN J. DIAMENT
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, NY 10022

Attorneys for Amicus Curiae

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

This case raises the question of whether almost 200 severely disabled children are to be deprived of special education authorized by a duly elected public school district board and provided in a public school by public school teachers employing standard curricula solely because the area encompassed by the school district is populated by citizens who share a common religious faith. A majority of the court below held that because the school district was coterminous with an area populated by members of one religious group, the law establishing the district created the kind of "symbolic union of church and state" prohibited by the "primary effect" prong of the *Lemon v. Kurtzman*, 403 U.S. 602 (1971), test. *Louis Grumet et. al. v. Board of Ed. of the Kiryas Joel Village School Dist.*, 81 N.Y.2d 518. The court made no factual finding that the students at the school were exposed to any religious indoctrination.

Amici believe that this case presents a clear example of the infirmities of the *Lemon* test and offers the Court an opportunity to refashion its approach to Establishment Clause jurisprudence. As this case makes clear, *Lemon* is inadequate to the task of helpfully guiding the relationship between religion and state in our nation.

The National Jewish Commission on Law and Public Affairs ("COLPA") is a non-profit association of volunteer attorneys and social scientists who donate their services for public advocacy on behalf of the Orthodox Jewish community. COLPA has filed briefs on the merits in most of the important religious liberty cases considered by the Court over the past twenty years. *See, e.g., Walz v. Tax Comm'n of*

the City of New York, 397 U.S. 664 (1970); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Cmte. for Public Educ. v. Nyquist*, 413 U.S. 756 (1973); *TWA v. Hardison*, 432 U.S. 63 (1977); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Mueller v. Allen*, 463 U.S. 388 (1983); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Lee v. Weisman*, 112 S.Ct. 2649 (1992); *Zobrest v. Catalina Foothills School Dist.*, 113 S.Ct. 2462 (1993).

This brief is joined by national organizations of Orthodox Jewish rabbis and scholars, as well as synagogues and social service organizations which represent a broad spectrum of the Orthodox Jewish community in the United States. One of the joining groups is the **Union of Orthodox Jewish Congregations of America** ("Orthodox Union"), a coordinating body for approximately 1,000 Jewish congregations in the United States.

The other groups joining in this brief are:

Amit Women; the largest women's zionist organization in the United States. Their 80,000 strong membership sponsors a network of education and welfare projects across the country.

Agudath Harabonim of the United States and Canada; the oldest Orthodox rabbinical organization in the United States, whose membership includes leading scholars and sages. It is intimately involved with educational, social, and legal issues significant to the Jewish community.

Emunah of America; a religious zionist organization comprised of 40,000 members who sponsor education and welfare projects for the needy.

National Council of Young Israel; a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel. It is involved in matters of social and legal significance to the Orthodox Jewish community.

Rabbinical Alliance of America; An Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been actively involved in a variety of religious, social, and educational areas affecting Orthodox Jews.

Rabbinical Council of America; The largest Orthodox Jewish rabbinical organization in the world with a membership in excess 1,000. It is deeply involved in issues related to religious freedom.

Torah Umesorah; The National Society for Hebrew Day Schools is the coordinating body for more than 600 Jewish Day Schools across the United States.

We are supporting the petitioners in this case because we believe that the Court of Appeals' use of the Establishment Clause to strike down the provision of secular benefits in a secular manner to a community because its members share a common religious faith is an undermining of religious liberty and is at odds with the language, history, policies, and sound judicial understanding of the First Amendment of our Constitution.

SUMMARY OF ARGUMENT

1. The Court should use this case as the means for overruling the unhelpful and much criticized three prong test elaborated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon* test has proven to be ambiguous and unhelpful to lower courts and legislatures in their attempts to negotiate the relationship between the state and religion. Furthermore, *Lemon*'s test does not serve the primary goal of the Constitution's religion clauses; the promotion of religious liberty. Rather, *Lemon* has turned the First Amendment on its head and made it a tool for the protection of the secular state. Such an approach does not conform with the goals the Framers sought in crafting the religion clauses, nor does it conform to the political history of our nation. Moreover, it does not serve the contemporary pluralistic society in which we live. Most of the members of the Court have thoroughly criticized *Lemon* in past decisions and several members have offered alternative approaches to dealing with church and state issues. We suggest that the Court adopt an approach that takes into account both religion clauses of the First Amendment and reads them as a coherent whole. Such an approach would view the Free Exercise Clause as a mandate for government accommodation of religious citizens when their practice would be otherwise burdened by the state. The Establishment Clause would be understood to set the limits on optional accommodation programs enacted by the state. In a case such as the one before the Court, the provision of a secular benefit to the religious community of Kiryas Joel would be viewed as a legitimate optional accommodation of religion, even if it were to somehow have failed the *Lemon* test, since it could not be perceived as endorsement of the Satmar faith by New York State. Such

application of the unified approach would properly serve the goal of the First Amendment; the promotion of religious liberty.

2. Should the Court retain the three prong *Lemon* test, Chapter 748 should still not be found an improper establishment of religion in violation of the First Amendment. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), requires that for a statute to pass muster under the Establishment Clause it must have a secular purpose, must not have the primary effect of advancing or inhibiting religion, and must not excessively entangle government and religion. Chapter 748 meets each of these requirements. The creation of the Kiryas Joel School District was in order to provide the secular need of secular special education for handicapped children. Chapter 748 does not have the primary effect of advancing religion; it does not, as the New York Court of Appeals suggested, serve to endorse the Satmar Hasidic faith by accommodating that community with the provision of education for their children. Lastly, there is no entanglement of religion and state in the implementation of the Kiryas Joel School District. The school is a public school offering secular education and part of the education system of New York State. It is not designed in any way to offer religious instruction and, therefore, does not require government monitoring of any sort. In finding Chapter 748 a violation of the Establishment Clause for the sole reason that the members of the Kiryas Joel community share a common religious faith is to impermissibly make their religious faith the basis of their standing in our political community. *See, Lynch v. Donnelly,* 465 U.S. 668, 687 (1984)(O'Connor, J., concurring); *Employment Div. v. Smith,* 110 S.Ct. 1595, 1599 (1990).

ARGUMENT

I. *LEMON* AND THE "PRIMARY EFFECT" TEST SHOULD BE OVERRULED AND REPLACED WITH A STANDARD THAT PERMITS GOVERNMENTAL PROVISION OF SECULAR NEEDS OF RELIGIOUS CITIZENS AND COMMUNITIES.

"The Establishment Clause [and similar state provisions] are broad charters of liberty, which embody in fundamental law the most basic assumptions of the secular democratic order."[1] These are the words of the proponents of retaining the three part test enunciated in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), and attempting to build a wall of separation between church and state which is high and thick. Such statements, however, and their underlying assumptions do not properly reflect the goals and principles of our Constitution's first concern; religious liberty.

Respondents and their *amici* argue for a secular democratic order, one in which any trace of religion or religious rhetoric is declared unacceptable, even, politically incorrect. This is clearly not reflective of our nation's constitutional life from its inception by our Founders to modern times. At the birth of our republic James Madison wrote his *Memorial and Remonstrance*. In this work he argued vigorously for the principle of religious liberty, but in doing so he sought to protect the church from the state, not vice versa, and in doing so he offered religious arguments. He wrote: "If

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1. Brief Amicus Curiae of The American Jewish Congress in Support of Appellees submitted to the New York Court of Appeals, at 10, emphasis supplied.

this freedom [to observe religion or not] be abused, it is an offence against God, not against man." J. Madison, *Memorial and Remonstrance Against Religious Assessments* (1785). The abolitionist movement was grounded in religious moral principles and rhetoric. Similarly, we can remember our nation's civil rights movement; led by clergy and invoking religious morality at every turn. A secular democratic order and its attendant attitude advocated by Respondents would have us spurn this nation's greatest accomplishments in its effort to secure liberty and equality for all its citizens.

Over the past decade scholars have convincingly demonstrated that the assumption that our constitutional Founders sought to create a totally secular society bereft of any and all influence by religious citizens and virtually hostile to the needs of those citizens to be simply incorrect. See, e.g., Akhil Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1159 (1991); Harold Berman, *The Religion Clauses of the First Amendment in Historical Perspective*, in *Religion and Politics*, (W. Lawson Taitte, ed., 1989); Phillip Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L.Rev. 839 (1986); Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986).

An examination of the Founders' statements at the time reveals that the First Amendment prohibitions were directed at Congress, not the states, and proscribed making any law "respecting an establishment of religion." The term "respecting," taken in its historical context, clearly suggests the purpose of the clause was to prevent the Congress from interfering with the state establishments of religion. Indeed, scholars have argued that the principal purpose of the

Establishment Clause was to protect state religious establishments from federal government disestablishment. See, Amar, *supra*; A. Adams and C. Emmerich, *A Nation Dedicated to Religious Liberty* (1990), at 46.

Of course, the political and legal character of our nation has changed since the founding era. The Bill of Rights, including the religion clauses, properly apply to the states. The society of our Founders was religiously and culturally homogeneous compared to contemporary America. The American people have come to embrace the concept of religious pluralism in a way our forefathers could not have imagined. Furthermore, it can be fairly argued that attitudes have changed within our religious communities. Members of religious communities in contemporary America are not robots commanded by their clerics and serving as their tools in the political discourse. Catholics who consider themselves devout members of their order, yet differ with their church on the issue of abortion are but one famous illustration of this phenomenon. Combining the principles of our Founders with the realities of our society can, then, yield a useful middle ground. While we should not return to the notion that states may establish religion, we ought to read the Establishment Clause to permit "government support of theistic and deistic belief [communities] more nearly comparable to the government support which is permitted to be given to agnostic and atheist [communities]." Berman, *supra,* at 72. As applied to the case now before the Court, such an understanding would easily allow the disabled children of Kiryas Joel to have their school and not be penalized for their religious faith.

Recently, Professor Stephen Carter of Yale Law School laid out a comprehensive and compelling analysis of the

religion clauses, their history and interpretation, and their role in our societal life to date in *The Culture of Disbelief*. S. Carter, *The Culture of Disbelief* (1993). His argument, and the argument with which we identify, is that "the principal task of the separation of church and state is to secure religious liberty," and that the "transformation of the Establishment Clause from a guardian of religious liberty into a guarantor of public secularism raises prospects at once dismal and dreadful." *Culture of Disbelief*, at 107 and 122.

Lemon has turned the Establishment Clause on its head. Consider its elements: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.'" *Lemon*, at 612. Thus conceived, the clause exists more for the benefit of secular politics than religious liberty; it attempts to erect a wall of separation to protect the political order and its institutions. Countless illustrations have been offered to demonstrate that *Lemon* is unhelpful in resolving Establishment questions. "Did legislation enacted at the behest of the religiously motivated civil rights movement have a secular purpose? If granting tax relief to parents whose children attend parochial schools advances religion by making the schools cheaper, does refusing to grant them inhibit religion by making them more expensive? If competing factions within the same church both seek to control of the same church building, does judicial resolution represent an excessive entanglement?" *Culture of Disbelief*, at 110. Each of these questions and more demonstrate that *Lemon* has come to be more of a hindrance than a help to our courts and our citizens in negotiating the relationship between governments and churches.

But there is more. The quiet statements of the scholarly critiques of the Court's Establishment Clause jurisprudence are mere whispers in comparison to the numerous and varied proclamations against *Lemon* and its progeny made by virtually each member of the Court at one time or another. As noted by Justice Scalia last term: "Over the years, no fewer than five of the [then] sitting Justices have, in their own opinions [criticized *Lemon*] and a sixth has joined in doing so." *See*, *Lamb's Chapel v. Center Moriches U.F.S.D.*, 113 S.Ct. 2141, 2150 (1993). To recall but a few specific examples: In 1985 Justice O'Connor noted "difficulties inherent in the Court's use of the test articulated in *Lemon*..." *Corp. of Presiding Bishop v. Amos*, *supra* at 346; and in 1989 Justice Kennedy recognized that "[s]ubstantial revision of our Establishment Clause doctrine may be in order." *Allegheny County v. Greater Pitt. A.C.L.U.*, 492 U.S. 573, 656 (1989). *Lemon* has not served, as some might have hoped, to provide clarity for lower courts and citizens, rather, it and its confused and conflicting progeny have made a muddle of, perhaps, the most important clauses of the Bill of Rights.

We have no doubt that the initial construction of the present jurisprudence was undertaken with the best of intentions, and its builders believed that both church and state would be best served if the state managed to maintain an active neutrality toward religion. However, as has been pointed out by Professor Carter, the neutrality approach does not effectively serve the goals of the religion clauses:

> The ideal of neutrality [toward religion] might provide useful protection for religious freedom in a society of relatively few laws, one

in which most of the social order is privately determined. That was the society the Founders knew. In such a society, it is enough to say that the law leaves religion alone. It is difficult, however, to see how the law can protect religious freedom in the welfare state if it does not offer exemptions and special protection for religious devotion...carving out a special place for religion is the minimum it might be said that [the religion clauses do]...Neutrality treats religious belief as a matter of individual choice, an aspect of conscience, with which the government must not interfere but which it has no obligation to respect...indeed, it can be trampled by the state as long as it is trampled by accident. *Culture of Disbelief*, at 133.[2]

In effect, the neutrality approach has fostered a disrespect for religious faith in our nation's public discourse, if not an overt hostility. This very case before the Court for review demonstrates the absurd distortion of the Establishment Clause's purpose. The Kiryas Joel school provides the secular needs of citizens of the State of New York; secular education for disabled children. As initially noted by this Court, *Cmte. for Public Educ. v. Nyquist*, 413 U.S. 756, 772 (1972), previous cases before the Court involving the relationship between religion and education fall into two categories: public

2. *See also, Abington v. Schempp*, 374 U.S. 203, 306 (1963)(Goldberg, J., concurring)(warning of "untutored devotion to the concept of neutrality" yielding an unconstitutional hostility toward religion).

aid to parochial schools or students,[3] and religious activities within public schools.[4] In Kiryas Joel a public school has been

3. *Zobrest v. Catalina Foothills*, 113 S.Ct. 2462 (1993)(sign language interpreter for parochial school student); *Aguilar v. Felton*, 473 U.S. 402 (1985)(public school instructors teaching on parochial school premises); *Witters v. Washington Dept. of Svcs.*, 474 U.S. 481 (1985)(aid to blind student at sectarian college); *Grand Rapids v. Ball*, 473 U.S. 373 (1985)(similar); *New York v. Cathedral Academy*, 434 U.S. 125 (1977)(reimbursement for record keeping and testing); *Wolman v. Walter*, 433 U.S. 229 (1977)(textbooks, diagnostic services, remedial education, standardized testing, trip transportation); *Roemer v. Bd. of Public Works*, 426 U.S. 736 (1975)(grants to private colleges); *Meek v. Pittenger*, 412 U.S. 349 (1972)(textbooks, materials, and other on-site services); *Cmte. for Public Educ. v Nyquist*, 413 U.S. 756 (1972)(funds for repair and maintenance, tuition reimbursement and tax benefits for parents); *Levitt v. Cmte. for Public Educ.*, 413 U.S. 472(1972)(funds for testing); *Hunt v. McNair*, 413 U.S. 734 (1972)(revenue bonds for sectarian universities); *Tilton v. Richardson*, 403 U.S. 672 (1970)(construction grants); *Lemon v. Kurtzman*, 403 U.S. 602 (1971)(teacher salaries, books, materials); *Early v. DiCenso*, 403 U.S 602 (1970)(salary supplements); *Bd. of Ed. v. Allen*, 392 U.S. 236 (1967)(textbooks); *Everson v. Bd. of Ed.*, 330 U.S. 1 (1946)(bus transportation).

4. *Lee v. Weissman*, 112 S.Ct. 2649 (1992)(prayer at graduation); *Edwards v. Aguillard*, 482 U.S. 578 (1982)(statute mandating teaching of creation science); *Wallace v. Jaffree*, 472 U.S. 38 (1985)(moment of silence); *Stone v. Graham*, 449 U.S. 39 (1980)(posting of Ten Commandments); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963)(prayer in school); *Engel v. Vitale*, 370 U.S. 421 (1961)(prayer); *Epperson v. Arkansas*, 393 U.S. 97 (1968)(barring teaching of evolution); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1947)(religious teaching by sectarian teachers); *see also, Lamb's Chapel v. Center Moriches U.F.S.D.*, 113 S.Ct. 2141 (1993)(use of school premises by religious group);

created to provide nothing but secular instruction to students and it has been found to be a violation of the Establishment Clause by virtue of the fact that all its students share a common religious faith. The creation of the school does not further a religious principle of the Satmar-Jewish faith in any way, all that remains as the basis of the opponents' objections is the religious identity of the Kiryas Joel community and their children. Carried to its logical conclusion, finding this school district to be an establishment of religion would require finding any other governmental structure present in a religiously homogenous community to be similarly invalid under the First Amendment.

The *Lemon* test's yielding this result is, perhaps, the best argument that can be offered for why the test, especially the ambiguous "primary effect" aspect of it, should be permanently discarded.

The seeds of a more workable approach have already been planted in the Court's jurisprudence and should now be cultivated independently from *Lemon*'s strangling roots. The concept of allowing for the accommodation of religion while proscribing state endorsement of religion can serve as a workable and useful approach in the application of the religion clauses. *See,* Eliott M. Berman, *Endorsing the Supreme Court's Decision to Endorse Endorsement,* 24 Colum. J.L. & Soc. Probs. 1 (1991). Such an approach would borrow concepts already present in the Court's opinions but, with a clear renunciation of *Lemon*, be modified and expanded into a more

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Widmar v. Vincent, 454 U.S. 263 (1981)(same); *Zorach v. Clauson*, 343 U.S. 306 (1952)(time release program).

coherent theory. Furthermore, an "accommodation/no-endorsement" approach would allow the Court to finally do what the text of the Constitution clearly intended; to read both the Free Exercise Clause and the Establishment Clause as coherent whole. *See, generally,* Michael McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev., 1; Thomas R. McCoy & Gary A. Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 Vand. L. Rev. 249 (1986).

A unified theory of the religion clauses would begin with the Free Exercise Clause. It would set the initial parameters of the state's relationship to religious citizens and communities. It would demand "positive accommodation" of the religious in our society. If the state were to pass a neutral law of general applicability that resulted in a burden on a religious practice the state would be required to demonstrate a compelling interest in not accommodating those citizens whose religious faith is burdened by the statute.[5]

Complementary to the Free Exercise aspect of the approach would be a no-endorsement demand resulting from the Establishment Clause. This clause would be properly understood to govern situations where the state has opted to benefit a religious community or citizens when it was otherwise not required to. A state may be assumed to be seeking to accomplish a legitimate purpose when it seeks to allocate its resources to its constituent communities. The issue, therefore, under the Establishment Clause would be whether the state was

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5. Although the compelling interest test was rejected in *Employment Div. v. Smith, supra*, it has been reintroduced by legislation passed by Congress and signed by the President in the Religious Freedom Restoration Act, P.L. 103-141 (1993).

improperly endorsing religion. If the state attempted to inappropriately endorse one religion, or religion as opposed to non-religion, this would be correctly viewed as violative of the Constitution; it would be a "negative accommodation." It is crucial, however, that religious constituencies must be as entitled to benefits from the modern state as much as any other constituency. To suggest otherwise is to turn the Establishment Clause into a device that disables the devout citizen rather than uphold his or her liberty. In a case such as this, the Court could properly conclude that New York seeks to fulfill its secular aim of educating handicapped children in secular studies and is doing so in a manner which is beneficial to a religious community, while not endorsing that community's beliefs.

Essentially, the unified theory suggests that the Free Exercise Clause sets the minimum deference the state must give to its religious members by means of positively accommodating their religious callings when a conflict may arise. The Establishment Clause sets the outer boundaries of permissible, optional undertakings by the state to aid religious communities. An accommodation which came to be viewed as endorsement would be branded a negative accommodation and be rejected.[6]

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6. This aspect of the approach could be taken a step further and allow for greater latitude for state aid to religion if, instead of endorsement, coercion of non-believers or other-believers is the prohibited state activity. We do not advocate that approach at this time, although it too has been offered by members of this Court. *See Allegheny County, supra,* (Kennedy, J., concurring in part and dissenting in part).

This unified approach, which we have described, extends and elaborates the groundwork laid by members of the Court in their previous discussions of accommodation and endorsement.

Members of this Court have already noted that allowing for accommodation of religion does not signify governmental endorsement of religion. *Lee v. Weisman*, 112 S.Ct. 2649, 2676 (1992) (Souter, J., concurring). In fact, this Court has stated that "'[i]t has never been thought either possible or desirable to enforce a regime of total separation...'" (citing *Nyquist*, at 760)..."[n]or does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). If, in fact, there is a mandate for accommodation, not merely permission for it, the Court should conform the whole of its religion clause doctrine to allowance of such activities by the state. In *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985), Justice O'Connor approvingly recognized accommodation as a means of negotiating the relationship between the two religion clauses.

The question that remains to be answered under the unified approach is how courts and elected officials might seek to determine when an optional accommodation by the state has become an impermissible endorsement. At the core of the consideration would be the realization that our nation seeks to have a public sphere which is religiously pluralistic, not secular. Furthermore, we would add the elements elaborated by Justice O'Connor in *Wallace, supra,* at 76, 83. The first element is whether an "objective observer familiar with the text, legislative history, and implementation of the statute would

perceive it as state endorsement..." Additionally, "in determining whether a statute conveys a message of endorsement...courts should assume that the 'objective observer' is acquainted with the Free Exercise Clause and the values it promotes."

In addition to these elements, a proper analysis would seek to pre-empt any government activity that would coerce or induce a particular set of beliefs or practices, or force participation in religious observance in a direct manner. In a case such as this one, the creation of a public school district for a Satmar Hasidic community, other citizens would not be reasonably induced to become Satmar Hasids to obtain some similar benefit. Additionally, in a case such as this there would be no message of endorsement yielding an incentive to religious faith because the state is providing the Satmar community with a benefit the broader community already receives, public education.

The rationale for seeking the adoption of the accommodation/no-endorsement reading of the religion clauses and the consequent treatment of religious citizens as full members of the political order flows from the proper historical understanding of religion in our nation's political life. Professor Carter has pointed out that, unlike the neutrality approach:

> Accommodation can be crafted into a tool that accepts religion as a group rather than an individual activity. When accommodation is so understood, corporate worship...becomes the [object] around which the state must make the widest possible berth. Accommodation is

> therefore closer to...the Founders' conception of religious groups as autonomous moral and political forces...vital to preventing majoritarian tyranny. *Culture of Disbelief*, at 134.

This approach to religious citizens and their communities allows for the greatest protection of religious liberty and for the benefits that secure religious communities can offer the broader society by acting as important "mediating" institutions in our national life. The Court has recognized the protected status of a variety of such institutions; family, *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978), civic associations, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1983), and social clubs, *Moose Lodge v. Irvis*, 407 U.S. 163, 179 (1972), are but a few examples. Historically, and in modern times, however, no such institutions are more important to the process of developing and transmitting general concepts of our nation's civic moral life than our churches. It is in this sense that Tocqueville viewed religion as "the first of [America's] political institutions." Tocqueville, *Democracy in America*, 292 (Anchor ed. 1969). It is in this sense, as well, that James Madison sought to foster "the multiplicity of sects" to secure religious and civil liberty in our nation. *The Federalist*, No. 51, at 326 (Lodge ed. 1908)

II. A STATUTE CREATING A PUBLIC SCHOOL DISTRICT IN ORDER TO EDUCATE DISABLED CHILDREN, WITH BOUNDARIES THAT ARE COTERMINOUS WITH A LAWFULLY INCORPORATED MUNICIPALITY WHOSE RESIDENTS SHARE A COMMON RELIGIOUS FAITH, IS NOT UNCONSTITUTIONAL ON THE GROUND THAT SUCH STATUTE HAS THE "PRIMARY EFFECT" OF ADVANCING RELIGION WITHIN THE MEANING OF *LEMON v. KURTZMAN*, 403 U.S. 602 (1971).

Chapter 748 of the Laws of 1989 is constitutional even if the Court retains and applies the three part *Lemon* test. This case concerns the state provision of secular services, public special education for the handicapped, to a group of its citizens. It is not the form of assistance the Establishment Clause is designed to reach, nor is it the form of assistance that has been previously examined by the Court. By enacting Chapter 748, New York State created a public school district encompassing the Incorporated Village of Kiryas Joel, a community whose members share a common religious faith. The school of that district is a secular school offering only secular instruction for handicapped children. The Legislature and Executive of New York determined that the children of Kiryas Joel were not receiving the education they were entitled to when they attempted to attend a larger school district, it therefore gave them their own so that the State's goal of properly educating all its children might properly be accomplished. Such an effort to accomplish a secular goal through secular means cannot be understood as a breach of the Establishment Clause, even as understood by *Lemon v. Kurtzman* and its progeny.

The Court's opinion in *Lemon v. Kurtzman* offers a three part test for Establishment Clause case analysis: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...finally, the statute must not foster an excessive government entanglement with religion." *Lemon*, at 612. The creation of the Kiryas Joel school district by Chapter 748 meets each requirement of this three part test. The Court will note that the Court of Appeals invalidated Chapter 748 on the basis of the second prong, the "primary effect" prong, alone. We will, therefore, only briefly describe the validity of the statute under the first and third prongs as well, concentrating our discussion on the second prong.

A. THE LAW'S PURPOSE IS SECULAR

Chapter 748 has a clear, unmistakable, and legitimate secular purpose; ensuring that handicapped children living in the town of Kiryas Joel, New York receive appropriate public secular education to which they are statutorily entitled. The New York Legislature and the Governor clearly sought to fulfill this purpose, to the exclusion of any other. Governor Cuomo's Approval Message stated specifically that "this bill is a good faith effort to solve this unique problem [of the Kiryas Joel children failing to receive their proper education]." Approval Message of the Governor, 1989 N.Y. Legis. Ann. at 325. In the past, the Court has found state efforts to fund educational services valid under *Lemon*'s first prong. The Court has recognized a "legitimate interest...in providing a fertile educational environment for all schoolchildren of the State." *Wolman v. Walter*, 433 U.S. 229, 236 (1977). In fact, "governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspect of

the *Lemon* framework." *Mueller v. Allen*, 463 U.S. 388, 394 (1983). In *Corp. of Presiding Bishop*, 483 U.S. 327, 335 (1987), this Court explained the aim of *Lemon*'s first prong: The "'purpose' requirement aims at preventing the relevant governmental decisionmaker...from...acting with the intent of promoting a particular point of view in religious matters." In no way can New York's effort to provide effective secular education for the disabled children of Kiryas Joel be viewed as the State promoting a particular view in religious matters.

Furthermore, even if the Court were to ignore these precedents and believe that a religious purpose is somehow served by creating the school district this Court should view it as a legitimate accommodation of religious practice. "[G]overnment acts with [a] proper purpose" when it undertakes to lift a governmental burden on the free exercise of religion. *Corp. of Presiding Bishop v. Amos*, *supra*, 338. "[The Constitution] affirmatively mandates accommodation" of religion. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Therefore, a statute designed to lift a burden on free exercise cannot violate *Lemon*'s "secular purpose" test.

B. THE LAW DOES NOT ENTANGLE CHURCH AND STATE

The third prong of *Lemon* seeks to prevent "excessive government entanglement with religion." No structure has been put into place that would foster governmental entanglement in the religious life of the Satmar community. The school at issue in this case, again, is a public school teaching nothing but secular studies and, therefore, is part of the regular educational apparatus of the State of New York. There is no need for any special monitoring mechanisms and

none have been created. There is no need since, unlike previous cases before the Court, this is not a case of public school programs in sectarian schools nor religious and public teachers working together in a public school. *See, e.g. Aguilar v. Felton*, 473 U.S. 402 (1985). This case unquestionably falls into the category described by the Court in *Wolman*, *supra*, at 248: "It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state."

C. THE PRIMARY EFFECT OF THE LAW IS SECULAR

The decision of the New York Court of Appeals centered on its finding that Chapter 748 violated the second prong, the "primary effect" prong, of the *Lemon* test. *Grumet v. Kiryas Joel, supra,* 81 N.Y.2d, at 527. Simply stated, the majority of the Court of Appeals erred in concluding that the primary effect of the statute is to create a symbolic union between New York State and the Satmar Hasidim. The opposite is true; the primary effect of creating the Kiryas Joel school district is to provide handicapped children with an appropriate secular education.

In analyzing whether the school district constituted an improper establishment of religion, the Court of Appeals relied on this Court's statement in *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 390 (1985), that the concern of the primary effects test is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denomination as an endorsement, and by non adherents as a disapproval, of their individual choices." *Grumet, supra,* at 528. As argued below by

petitioners, this reading of *Grand Rapids* is incorrect. Justice O'Connor, the original proponent of the perception-of-endorsement approach, has stated: "The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as endorsement." *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985). In this case an objective observer viewing any one of these elements would properly and reasonably conclude that New York was not endorsing the Satmar faith. The text of Chapter 748 makes no reference whatsoever to religion. The Governor's Approval Message specifically stated the position that the school district would be administered in a totally secular manner. The implementation; the actual operation of the school district has been nothing but secular since its opening. All of these facts undercut the analysis of the Court of Appeals.

Additionally, the Court should note that the reasoning employed by the New York Court in its finding an improper establishment runs afoul of this Court's statements on this issue in other cases. The Court below found a "symbolic union of church and state" in the act that only Hasidic children will attend the public schools in the newly established school district, and only members of the Hasidic sect will likely serve on the school board." *Grumet*, at 529. This is an almost frightening piece of reasoning. The fact that the residents of Kiryas Joel share a common religious faith results in finding secular government action for that community an establishment of religion. Followed to its logical conclusion, this reasoning would no doubt invalidate institutions across our country in the thousands of localities where only Protestants reside, or only Catholics reside, or only Episcopalians reside. More importantly, in her concurring opinion in *Lynch, supra, at* 687,

Justice O'Connor correctly stated that the "Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." The Court of Appeals in determining precisely that the adherence of the residents of Kiryas Joel to the Satmar faith, and nothing else invalidates the school, is itself making the faith of the persons relevant to their standing in the political community and finding that as a result of that faith they are not entitled, as any other members of the political community, to the full range of their benefits of citizenship. A court cannot, consistent with the Free Exercise Clause, impose such a disability on the Kiryas Joel community on the basis of their religious views or status. *See, Employment Div. v. Smith*, 110 S.Ct. 1595, 1599 (1990).

Central to this case's analysis should be the fact that there is no religious tenet of the Satmar faith being served by the creation of the separate school district. Satmar Hasidim are a sect of Jews. Separatism is not a religious precept of Judaism or the Satmar sub-faith. Maintaining a separate community is viewed by Satmar Hasidim as a more conducive method for fostering and maintaining religious belief and practice, nothing more. The essential motivation for seeking a school for the handicapped for their children alone is neither to further core religious tenets or the peripheral aid of a separate environment, it is the desire for secular education for the handicapped children; education that was not benefitting the children when they were exposed to the additional "handicaps" of confronting a different language, lifestyle, and mode of dress in the broader Monroe-Woodbury school.

Beyond the fact that the creation of the Kiryas Joel district is not an endorsement of religion and thereby not

violative of the "primary effect" test, it may be the very type of accommodation of religion demanded by the Court's reading of the Free Exercise Clause. Just as "[i]n freeing the Native American Church from federal laws forbidding peyote use...the government conveys no endorsement of peyote rituals, the Church, or religion as such," *Lee v. Weisman*, 112 S.Ct. 2649, 2677 (1992) (Souter, J., concurring), New York's creation of the Kiryas Joel school district ought to be understood, at most, as properly accommodating the religious needs of the Satmar residents. The loss of publicly funded special education qualifies as a burden deserving the state's accommodation especially since that accommodation is minimal. The public school in Kiryas Joel is perfectly willing to accept any child within its jurisdiction, not only Satmar children, and its activities are nothing but secular.

Furthermore, an accommodation need not be compelled by the Free Exercise Clause for it to pass constitutional muster under the Establishment Clause. *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970). The citizens of Kiryas Joel, therefore, need not demonstrate that they are entitled to a separate school district for Chapter 748 to be found a constitutional accommodation.

Lastly, the Kiryas Joel case is appropriately governed by the Court's decision in *Wolman v. Walter*, *supra*, a case decided utilizing the *Lemon* analysis. In *Wolman* the Court stated that "providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion." *Wolman* at 248. No constitutional violation was found in the "fact that a unit on a neutral site may...serve only sectarian pupils." *Id.*, at 247. Chapter 748 creates a neutral site at which sectarian

pupils receive appropriate secular therapeutic services. The Kiryas Joel pubic school is just that, a public school. It, therefore, should be found a valid means of providing for the secular needs of Kiryas Joel's children since it does not have the primary effect of advancing religion.

CONCLUSION

In *Grand Rapids, supra,* at 431, Justice O'Connor wrote in dissent that "[f]or these children, the Court's decision is tragic. The Court deprives them of a program that offers a meaningful chance at success in life..." It would be similarly tragic for the children of Kiryas Joel to be deprived of their best chance at success in life by the invalidation of Chapter 748. It would be an even greater tragedy, however, because it would send the unequivocal message to all citizens of our nation that possess a religious faith that they are not as entitled to government support of their secular needs as their non-religious neighbors.

For the foregoing reasons, the judgement of the Court of Appeals should be reversed with instructions to enter judgement for the defendants.

Respectfully submitted,

JULIUS BERMAN,
(Counsel of Record)
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 PARK AVENUE
NEW YORK, NY 10022
(212)836-8000

DENNIS RAPPS, COLPA;
NATHAN J. DIAMENT,
DEBEVOISE & PLIMPTON
(Of Counsel)